UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air Warming Devices Products Liability Litigation	File No. 15-MD-2666 (JNE/FLN)
	December 21, 2017
	Minneapolis, Minnesota
	Courtroom 12W
	9:52 a.m.

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

THE HONORABLE FRANKLIN L. NOEL
UNITED STATES MAGISTRATE JUDGE

(STATUS CONFERENCE)

APPEARANCES

FOR THE PLAINTIFFS:

MESHBESHER & SPENCE
Genevieve M. Zimmerman
1616 Park Avenue
Minneapolis, MN 55404

CIRESI CONLIN
Michael Sacchet
225 South 6th Street
Suite 4600
Minneapolis, MN

KENNEDY HODGES, LLP
Gabriel Assaad
4409 Montrose Blvd
Suite 200
Houston, TX 77006

FOR THE PLAINTIFFS (cont'd):

KENNEDY HODGES, LLP
David W. Hodges
711 W. Alabama Street
Houston, TX 77006

KIRTLAND AND PACKARD LLP
Behram V. Parekh
2041 Rosecreans Avenue
Third Floor, Suite 300
El Segundo, CA 90245

FARRAR & BALL, LLP
Kyle Farrar
1010 Lamar, Suite 1600
Houston, TX 77002

FOR THE PLAINTIFFS (APPEARING BY PHONE:)

PRITZKER HAGEMAN, P.A.
David J. Szerlag
Wendy Thayer
45 South 7th Street, #2950
Minneapolis, MN 55402-1652

GROSSMAN & MOORE, PLLC
Emily A. DeVuono
Jennifer Moore
401 W. Main Street
Suite 1810
Louisville, KY 40202

HARE WYNN NEWELL & NEWTON
Don McKenna
Peggy Little
Lynne Reed
Massey Building
2025 Third Avenue North
Suite 800
Birmingham, AL 35203

MCEWEN LAW FIRM, LTD
Melissa Schmid
5850 Blackshire Path
Inver Grove Heights, MN 55076

FOR THE PLAINTIFFS(appearing by phone):

MORGAN & MORGAN, PA
Heather Cullen
Joseph T. Waechter
Michael Goetz
201 N. Franklin St 7th Floor
Tampa, FL 33602

RAIZNER SLANIA, LLP
Jeffrey L. Raizner
Rica Rinosa
2402 Dunlavy Street
Houston, TX 77006

LONCAR & ASSOCIATES
William Hymes
John L. Coveney
424 S. Cesar Chavez Blvd
Dallas, TX 75201

CAPRETZ & ASSOCIATES
Don K. Ledgard
5000 Birch St, Suite 2500
Newport Beach, ca 92660

MICHAEL HINGLE & ASSOCIATES
Bryan Pfleeger
Julie Jochum
220 Gause Blvd
Slidell, LA 70005

DAVIS & CRUMP, PC
Martin D. Crump
Robert D. Cain, Jr.
Wes Stevenson
2601 Fourteenth Street
Gulfpost, MS 39507

LEWIS & CAPLAN
Pete Lewis
Sarah Delahoussaye Call
Amy Webster
3631 Canal Street
New Orleans, LA 70119

THE RUTH TEAM
Steven C. Ruth
842 Ramond Avenue
Suite 200
Saint Paul, MN 33733-5157

FOR THE PLAINTIFFS(appearing by phone):

LAW OFFICES OF TRAVIS R. WALKER
Travis R. Walker
Julie Treacy
Felissa McHardy
1235 SE Indian Street
Suite 101
Stuart, FL 34997

ANDREWS & THORNTON
Anne Andrews
John Thornton
Lauren Davis
2 Corporate Park, Suite 110
Irvine, CA 92606

JOHNSON BECKER PLLC
Rolf T. Fiebiger
444 Cedar Street
Suite 1800
Saint Paul, MN 55101

LORD & ASSOCIATES
Priscilla Lord
309 Clifton Avenue
Minneapolis, MN 55403

MURRAY LAW FIRM
Caroline Whitney Thomas
650 Poydras Street
Suite 2150
New Orleans, LA 70130

BROWN & CROUPPEN, PC
Abby Cordray
211 North Broadway, Suite 1600
St. Louis, MO 63102

BEASLEY ALLEN
Megan Robinson
Renee Lindsey
Matthew Munson
218 Commerce Street
Montgomery, AL 36104

FOR THE PLAINTIFFS(appearing by phone):

HOLLIS LEGAL SOLUTIONS, PPLC
Scott Hollis
6814 Crumpler Boulevard,
Suite 101
Olive Branch, MS 38654

FITZGERALD LAW GROUP, LLC
Kevin Fitzgerald
120 Exchange Street
Suite 200
Portland, ME 04101

LAW OFFICES OF PETER ANGELOS, P.C.
Thomas Keilty, III
100 North Charles Street
Baltimore, MD 21201

MESHBESHER & SPENCE, LTD
Holly Sternquist
1616 Park Avenue
Minneapolis, MN 55404

PARKER WAICHMAN, LLP
Nicole Eisner
Michael S. Werner
59 Maiden Lane
6th Floor
New York, NY 10038

RANDALL J. TROST, P.C.
Carrie Hancock
Pam Rodriguez
Randall T. Trost
801 Main Street
Lynchburg, VA 24504

NEAL R. ELLIOTT, JR.
P.O. Box 80136
Baton Rouge, LA 70898

NASH & FRANCISKATO LAW FIRM
Brian Franciskato
Amanda Cryderman
2300 Main Street, #170
Kansas City, MO 64108

FOR THE PLAINTIFFS(appearing by phone):

BROUS LAW LLC
Carrie Brous
3965 West 83rd St. #115
Prairie Village, KS 66208

BAILEY PEAVY BAILEY COWAN
HECKAMAN, PLLC
Justin Jenson
The Lyric Centre
440 Louisiana Street
Suite 2100
Houston, TX 77002

GERTLER LAW FIRM
Meyer H. Gertler
935 Gravier Street
Suite 1900
New Orleans, LA 70112

LANGDON & EMISON
Brett Emison
Rachel Ahmann
Lauren Niendick
911 Main Street
Lexington, MO 64067

THE WEBSTER LAW FIRM
Chelsie Garza
6200 Savoy Suite 150
Houston, TX 77036

LAW OFFICES OF JAMES S. ROGERS
Marci Umatum
James S. Rogers
Elizabeth J. McLafferty
Annaliese Abbey
1500 4th Avenue #500
Seattle, WA 98101

LEVIN PAPANTONIO
Ben Gordon
Daniel Nigh
316 S. Baylen Street
Suite 600
Pensacola, FL 32502

FOR THE PLAINTIFFS(appearing by phone):

THE OLINDE FIRM, LLC
Wesley G. Barr
Alfred Olinde, Jr.
400 Poydras Street
Suite 1980
New Orleans, LA 70130

SANDERS PHILLIPS GROSSMAN
Randi Kassan
100 Garden City Plaza
Suite 500
Garden City, NY 11530

BERNSTEIN LIEBHARD LLP
Dae Lee
10 East 40th Street
New York, NY 10016

DEGARIS LAW GROUP, LLC
Annesley DeGaris
Wayne Rogers, Jr.
2 North 20th Street
Suite 1030
Birmingham, AL 35223

KELLY BERNHEIM DOLINSKY, LLC
Paula Bliss
4 Court Street
Plymouth, MA 02360

BRENT COON & ASSOCIATES
Miyoshi Rivers
300 Fannin, Suite 200
Houston, TX 77002

HOUSSIERE DURANT & HOUSSIERE
Randall A. Kauffman
Monica Vaughan
Shirley Strom-Blanchard
1990 Post Oak Blvd Suite 800
Houston, TX 77056

HURLEY MCKENNA & MERTZ
Molly Condon
Brian Holmes
Michael Mertz
33 North Dearborn Street
Suite 1430
Chicago, IL 60602

FOR THE PLAINTIFFS(appearing by phone):

GOZA & HONNOLD, LLC
Lisa Joyce
11181 Overbrook Road, Suite 200
Leawood, KS 66211

COLLING GILBERT WRIGHT & CARTER, LLC
Lia Thomas
Melvin Wright
The Florida Firm
801 N. Orange Avenue
Suite 830
Orlando, FL 32801

NEWMAN BRONSON & WALLIS
Lauren E. Bronson
2300 West Port Plaza Drive
Saint Louis, MO 63146

RILEY & JACKSON, P.C.
Jeremiah Mosley
Keith Jackson
Mary Malea Sellers
3530 Independence Drive
Birmingham, AL 35209

SHELTON LAW GROUP
John R. Shelton
9300 Shelbyville Road
Suite 215
Louisville, KY 40222

SKIKOS CRAWFORD SKIKOS& JOSEPH, LLP
Melissa Erin Mielke
Julie Tucci
One Sansome Street, Suite 2830
San Francisco, CA 94104

THE WHITEHEAD LAW FIRM, LLC
Anna Higgins
C. Mark Whitehead, III
Eric Mausner
Petroleum Tower, Suite 303
3639 Ambassador Caffery Pkwy
Lafayette, LA 70503

FOR THE PLAINTIFFS(appearing by phone):

TATE LAW GROUP, LLC
Mark Tate
Mary Nichols
Jim Shipley
2 East Bryan Street
Suite 600
Savannah, GA 31328

THE MILLER FIRM, LLC
Tayjes Shah
108 Railroad Avenue
Orange, VA 22960

FOR THE DEFENDANTS 3M:

BLACKWELL BURKE P.A.
Jerry Blackwell
Ben Hulse
Deborah Lewis
Corey Gordon
Mary Young
431 South Seventh Street
Suite 2500
Minneapolis, MN 55415

FAEGRE BAKER DANIELS
Bridget M. Ahmann
90 South Seventh Street
Suite 2200
Minneapolis, MN 55402

Court Reporter: MARIA V. WEINBECK, RMR-FCRR
1005 U.S. Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415

Proceedings recorded by mechanical stenography; transcript produced by computer.

P R O C E E D I N G S

(9:52 a.m.)

THE COURT: Thank you, good morning.

MAGISTRATE JUDGE NOEL: Good morning.

THE COURT: Let me just check before -- you can please be seated. And I was going to check here and see if the phone is working before we get started. Could someone on the phone say something?

(Unidentified voice heard.)

MAGISTRATE JUDGE NOEL: Maybe the phone is all set up and nobody bothered to call.

THE COURT: Can you hear us all right?

MR. GORDON: Ben Gordon (inaudible) I'm here, Your Honor.

THE COURT: Okay, I'm going to mute you now. I was just checking to see if you were there.

All right. I say we just get started on the joint agenda. The pretrial orders and case schedule, does anybody want to say anything about that?

MR. BLACKWELL: Your Honor, if I may.

Good morning, Your Honors. Jerry Blackwell for 3M. As Your Honors know, the Skaar case is now gone. The CNRA testified that the Bair Hugger was not in fact used in the surgeries at issue. So we're down to the Gareis cases remaining for bellwether.

The parties have had some exchanges for proposal to the Court for a new schedule. We've sent our proposal to the plaintiffs. I think they still have some conferring to do on their side. And maybe the most productive thing, if Your Honors would give us a sort of return date to get a proposal back to the Court, I think together we can work to do that.

MS. ZIMMERMAN: With respect to the bellwether repopulation issue?

MR. BLACKWELL: Yes.

MS. ZIMMERMAN: Yes, we're happy to do that.

MR. BLACKWELL: So nothing further to say.

MS. ZIMMERMAN: And, Your Honor, if I may?

THE COURT: Yes, Ms. Zimmerman.

MS. ZIMMERMAN: I suspect that may be a few issues, and I suspect that Mr. Hulse and some of his colleagues may chime in as well.

With respect to this first issue, the pretrial orders and case schedule, we're in agreement with Mr. Blackwell in terms of how we would like some input from the Court as to how best to address this issue of repopulating the bellwether pool. I think that that's a separate issue in the agenda.

But with respect to number one, pretrial orders and case schedule for the Gareis matter, I do think that we

are in a situation where we may need a little bit of extra time to complete the expert depositions in that matter.

We just received the case specific expert reports from defense counsel this Monday. We've been advised that there are only two available dates where the relevant counsel for defendants is able to take the deposition of Dr. Elgobashi in January. And, unfortunately, the two dates that are available for Mr. Goss don't work for Dr. Elgobashi.

I know that Dr. Borak, who is one of defendant's disclosed experts on case specific causation, likewise is not available for deposition on any day in January. And so I've had some conversations in the last few days with Ms. Lewis for 3M, and we've discussed whether or not we might try to push the deadline for expert depositions maybe a couple weeks into February to accommodate these kind of schedule things. It does seem at this point we are going to have at least nine experts subject to deposition in the course of January and perhaps these first two couple weeks of February.

We have two set so far. Dr. Jarvis is set to be done, as is Dr. Stonnington. Those are both plaintiffs' experts, and we're waiting to finalize Dr. Elgobashi's deposition date.

We are waiting on dates for the defendant's

experts when they will be available. I know that Dr. Borak is not available in January, and we were told we'd be getting those dates from them when they got their reports, but to my knowledge we don't have those just yet. So, I think --

THE COURT: What would that do to the trial date?

MS. ZIMMERMAN: So that's a great question, Your Honor. One of the things that we talked about on the phone this week was the parties' mutual desire for a date certain, and we wanted to check with the Court to see if the -- so the present scheduling order says the case should be ready, trial ready on April 30th. We're not certain if that is a trial date certain on Your Honor's calendar.

And if so, certainly both parties would like to have a trial date certain, given the numbers of experts and the complexity of arranging those schedules. So we're not sure if that's a trial date certain on Your Honor's calendar or if the trial date would potentially be pushed by a couple of weeks or so.

THE COURT: I'm planning on trying the case then.

MS. ZIMMERMAN: Excellent.

THE COURT: That's what I'm looking at. It says, "tentative" on my calendar, but there's nothing else there, and it's as good a time as any.

MS. ZIMMERMAN: Perfect.

THE COURT: So I am planning on trying it then.

MS. ZIMMERMAN: Well, that's welcome news, and I think that both parties wanted to just get an idea about whether that was a date certain so that we could communicate with our experts about that.

And in terms of what it means if we push the -- if we give the parties a couple of extra weeks to complete these expert depositions through the first part of February, the plaintiffs have proposed that we push presently under the Court's scheduling order dispositive motions on case specific issues would be due on February 6th, which was seven days after the close of expert discovery or expert depositions.

We would say that if perhaps we pushed the expert deposition date back to say February 16th, we could follow the same time path that Your Honors had laid out, and seven days later have dispositive motions be due.

And the question that we had or the discussion we had was how much that might jam up Your Honor's calendar in terms of hearing those.

I think the other thing that we discussed, to the extent it works for Your Honors, it may be helpful for the parties and the Court to sit down perhaps informally after this status conference to discuss just housekeeping matters in anticipation of the trial, when motions in limine might

be due, jury instructions, the kind of different housekeeping things that might be helpful to keeping this trial on track.

So I think that those were some additional thoughts from the plaintiffs' perspective, certainly on agenda Item Number 1.

MAGISTRATE JUDGE NOEL: I just had a question on the case specific dispositive motions. What -- and I guess it's more for the defendants than you because I guess you're not going to have any or you will.

MS. ZIMMERMAN: Well, I think we're going to see a lot of the same experts. There are no new experts that have been disclosed by either side. There is some potentially duplicative, I mean we have a 95 page report from Dr. Wenzel that we'll be doing a deposition on.

I think that the parties will probably have to read the Court's Order on the general causation, Daubert issues, and keep that in mind as we anticipate case specific motions as well. I hope it's not as big of a list this time around, but I suspect there will be some motions that are submitted.

MAGISTRATE JUDGE NOEL: I guess that's my question. So are the case specific dispositive motions similar? Are they going to be a rehash of Daubert things or something different.

MS. ZIMMERMAN: I would certainly hope that we're not going to rehash everything that we've already presented to the Court, but I can only speak for the plaintiffs.

MAGISTRATE JUDGE NOEL: Okay.

THE COURT: Mr. Hulse?

MR. HULSE: Thank you, Your Honors. Good morning. Ben Hulse for the defendants.

There certainly won't be a rehash of the general causation motions. I think we know better than that. But this is where the rubber hits the road in a specific case. What plaintiffs have to show here and the experts have to show is that the Bair Hugger system actually caused Mr. Gareis's infection.

So we have a host of other issues, alternative causes and so forth that are going to be at issue on specific cause. And it is absolutely our anticipation that we will file motions to exclude each of the plaintiffs' experts and that we will file a summary judgment motion.

Our concern with the April 30th date certain, if we're then moving the Daubert deadline is that we're not actually getting to a hearing on Daubert and summary judgment until into April. And, obviously, the Court will take the time it will take, but it only allows potentially a few weeks for consideration and decision on motions that will be involved motions.

So while we do have the single availability issue with Dr. Borak who has got some significant medical treatment in January, we do think it's possible to get this all done within the present schedule. But if we are going to move the Daubert schedule, our suggestion would be that we just, that if it works with the Court schedule, that we push that trial date out accordingly, whether it's one week or two weeks, just because we're already pretty compressed on the time between Daubert and trial.

THE COURT: Let's talk about the dates in our informal meeting when we get done here. I hate to do anything with the calendar without all the relevant people involved.

MR. HULSE: Makes sense to us, Your Honor.

THE COURT: All right. I'd like to get this bellwether pool repopulated as soon as possible. Is that something else that you want to talk about informally? I think, Mr. Blackwell, that's what you said you thought that you and the plaintiffs could work on something?

MR. BLACKWELL: Your Honors, we could talk about it informally with the Court. As I say, we had sent our proposal to plaintiffs. I don't know that they've had a chance to meet and confer on their side.

THE COURT: Okay.

MS. ZIMMERMAN: And, Your Honors, so Ms. Conlin

sends her regrets for not being here. She's wrapping up a trial out of state, and Mr. Ciresi is also out of town. And I know Mr. Gordon sent a note to you. He's stuck I think in the Atlanta airport right now.

So we've had some difficulty getting our side a chance to kind of review the entire proposal. We thought that it made a lot of sense to get some input from Your Honor in terms of what you'd like to see. Certainly from the plaintiffs' perspective, one key part that we think that needs to be added is some mutual discovery on case specific issues. And we can talk at length about the issues that we run into with the respect to the Skaar case and the Gareis matter, where some of the things that we sought along the course of this case, customer lists, other case specific communications between defendant and the hospitals for these plaintiffs have not been produced, despite our requests. We don't have a defendant fact sheet. And normally in a case like this where we had a defendant fact sheet, we would have some of this information.

Discovery about detailed people. It's what they call the sales folks that go out to the hospitals. Sales information that confirms in fact that certain blankets were provided. And the reason that that's come up, and, unfortunately, to trouble Judge Noel about this just about two weeks ago, we ended up with an emergency telephone

conference before Your Honor, and then actually the next day an emergency motion to quash by the third party hospital with respect to some of the discovery that we're seeking.

I think given the discovery response that we got from Smith's Medical, which is another third party we received just yesterday, I assume that that has put to bed any questions about products with respect to Mr. Gareis.

We have testimony from the anesthesiologist and from the CRNA that in fact it was used in Mr. Gareis' case. The hospital records that we've been provided confirmed that as well. But we have been provided a lot of e-mails now just over the last few weeks between the defendants and the hospital for Mr. Gareis. So it would have been responsive discovery that we had served but hadn't been produced until now. And they thought perhaps there might be a product ID issue, and they can say that, well, it wasn't Bair Hugger, which is Smith Medical instead. So some of these things we think could have been avoided if we had product information, customer lists.

MAGISTRATE JUDGE NOEL: Let me interrupt for a quick second because it occurs to me that people on the telephone probably are not hearing either of you from where you're standing.

MS. ZIMMERMAN: I apologize. That's a good point, Your Honor.

Genevieve Zimmerman for plaintiffs. I won't restate everything, but one of the issues that the plaintiffs have with respect to the proposal the defendants have put together on repopulating the bellwether pool really has to do with mutual discovery obligations on case specific issues from defendants. Typically, what we see in MDLs like this is a defendant fact sheet or something like that. Certainly, when it comes to the bellwether plaintiffs that have been nominated, we would suspect that relevant to that would be customer lists, information about what blankets, what machines have been placed at these hospitals.

MAGISTRATE JUDGE NOEL: But what goes into the plaintiffs front end work to determine that a Bair Hugger was used in the first place because you don't get to sue them unless --

MS. ZIMMERMAN: Certainly, Your Honor.

And so what's happened in all six of the bellwether cases that made it to the kind of final nomination from the plaintiffs' perspective is there in the medical record, generally speaking, an anesthesiology record, where there's a box sometimes that actually has a little Bair Hugger logo on it. Sometimes it says, "Bair Hugger." Sometimes it says, "forced air warming." Sometimes there's a line through it. Sometimes it's circled. Sometimes it's checked. And so we have that.

Sometimes it's reflected in the billing records from the hospital as well.

But, again, it's certainly on the plaintiffs to begin that process before they start a lawsuit to make sure that they have some objective evidence that Bair Hugger was in fact used in the surgery at issue.

But what we've run into now is that despite -- I'll take the Gareis case, for example, where there is in fact a check mark on the relevant surgery note. We have deposition testimony from the anesthesiologist and from the CRNA that says, yes, this was used. After those depositions happened, the defendants served third party subpoenas and produced some e-mails to us between defendants and hospital representatives back in the time of the subject surgery 2009 and 2010, that they believed indicated that perhaps the hospital was moving to use Smith's Medical, which is another forced air warming product.

Given what we now know, based on the third party subpoena response received yesterday, Smith's Medical never sold any products to this particular hospital. And we do know that 3M did in fact sell Bair Huggers and placed this machine at these hospitals. So I think we're past that, but that wasn't until we had been out to South Carolina on three separate trips for multiple depositions and hospital inspections.

So to the extent that the defendants have proposed in their bellwether repopulation proposed order that there be some affirmative obligations on the plaintiffs, we certainly welcome that, and we think it's appropriate.

But we think that that responsibility should be a mutual obligation as is generally done in many other cases, such that as they have obtained, you know, customer lists from a competitor in this case, but we haven't obtained those here.

We can see based on some of their documents, hey, you sent this many blankets, and this many machines to the hospital in question on these dates. And here are the e-mails that you had with that particular facility that would be relevant in this case. So it's not that we think we shouldn't have to produce some information, we just think that it should be a mutual observation, so we can avoid some of these issues.

MR. BLACKWELL: Your Honor's, if I could be heard on our position since you heard a response to our position not having heard our position. Mr. Hulse, perhaps, you could speak to it.

MR. HULSE: Good morning again, Your Honors. The fundamental issue here is that what has become clear from this set of bellwethers that we've been working up is the fact that there is a medical record, which sometimes is an

ambiguous medical record, doesn't in fact tell you in many cases that the Bair Hugger was in fact used.

And the way that you find that out is, for example, as we saw in the Skaar case, you talk to the CRNA, the registered nurse anesthetist who said in the deposition oh, yeah, I would have marked this differently if I used it. Our view point is that's the kind of diligence that needs to happen at the front end. It ought to happen before the case is filed. If it doesn't happen, it ought to happen before the case goes into the Bair Hugger -- into the bellwether pool.

So what our proposal does is it just modifies the old process to put in a requirement that there either be a medical record that's clear or a statement reflecting a discussion between plaintiffs' counsel and the CRNA or the anesthesiologist that confirms the Bair Hugger was in fact used.

We, for our part, this premise that we haven't produced documents on Bair Huggers at hospitals is just not right. For the pool, the initial, the last pool of 32 cases, we produced the information about all the Bair Huggers that had been placed at those hospitals.

Gareis had a special case where we found through deposition testimony that they had apparently piloted the HotDog system, so we went back and did some additional

discovery there. But we have provided that Bair Hugger placement information for the cases in the prior bellwether pool, and we would do that for this one too.

But, ultimately, just because a Bair Hugger is there doesn't mean that it was used in this particular surgery. And I think we knew at the front end, but the discovery has certainly confirmed that we're going to find in lots of cases that the Bair Hugger wasn't used, and neither side should be wasting time on those cases when that could have been found out at the front end.

THE COURT: So the purpose of bellwethers is to find out whether there are some conclusions that can be drawn that are generalizable. So far the bellwether process has been useful it seems in identifying a problem, which is that the medical record with the check is an insufficient indicator of whether the case does or does not belong in a lawsuit against the Bair Hugger.

What, if any, suggestion do you have for how further, you know, fair enough the plaintiffs would not have known before we went into this bellwether process that that was not, that that's not enough to show that you've actually got a case against a particular product. And they say, you know what they say.

MR. HULSE: Yes.

THE COURT: So what's your suggestion on how we

get over that hump?

MR. HULSE: Our suggestion is that there ought to be a -- unless you really have an absolutely clear record -- there ought to be a final communication between plaintiffs' counsel and in most cases it will be the CRNA. You know, we went through a discussion earlier in the case about contacts, they have unfettered access to treaters and that communication ought to happen.

And then what we're suggesting is part of the process that we've proposed is that there be a statement, that before the case can go into the bellwether pool, the plaintiffs' counsel provide a statement that says we talked to the CRNA on this date, and they confirmed based on medical record or whatever other evidence that the Bair Hugger was in fact used in this surgery.

THE COURT: Okay. Ms. Zimmerman, what would be the problem with now that you know that what you were relying on isn't good enough, what's the problem with something along the lines that Mr. Hulse was just talking about where there has to be at least a --

MS. ZIMMERMAN: A statement --

THE COURT: -- a communication, talk to somebody.

MS. ZIMMERMAN: Sure. So, Your Honor, I think, first of all, we do have objective evidence that it was used. And what the deposition testimony has shown so far is

that the CRNA or the anesthesiologist from a case like Gareis where the surgery was in 2010, they don't have an independent memory of these patients. And so what they do is they go back and they look at the record, and they say, oh, was there a check mark there? And that's really what ended up being the issue in Skaar, which incidentally was a defense pick, and there was an indication on the sheet.

THE COURT: Okay. I know you're saying that you want us to revisit the ruling about you getting all the defendant's sales records and everything, and let's just assume for the moment that's not going to happen. So what else do you -- I mean in the absence of some other suggestion, the defendant's suggestion seems pretty reasonable to me.

Of course, it's not going to be iron clad but we now know from the bellwether process is what you have been relying on is insufficient, so we can't do that again. So what else can we do?

MS. ZIMMERMAN: Well, I think that the burden in terms of repopulating the bellwether pool, if what we're going to do is get an affirmative statement from a CRNA or the treating physician on 4200 cases prior to selecting 150 for potential bellwether considerations, it just seems from a logistical standpoint not to be likely to be very easily done.

MAGISTRATE JUDGE NOEL: I don't think that's what they're suggesting. I think they're suggesting we come up this 150 case randomly selected pool and then you folks go through these steps, but one of the new steps would be before a case gets into the bellwether actual pool, you need to -- not you personally.

THE COURT: Y'all.

MAGISTRATE JUDGE NOEL: The lawyer for the client whose case is proposed to be in the bellwether pool needs to have some affirmative evidence that there was a Bair Hugger used in the surgery. And that doesn't strike me as being an overly burdensome or unreasonable request in light of what we have observed about the cases that were in the initial bellwether.

MS. ZIMMERMAN: Okay. Recognizing where the Court is going on this, I think that it seems to be kind of a hybrid or headed towards a lone pine of sorts, which is typically not done at this stage. But certainly if we had 150 cases that are randomly selected by the Court to be considered for the bellwether pool, and the Court directs that we need to have, you know, the 134 law firms that are presently involved in persecuting or prosecuting cases here get -- "persecuting" mind slip -- get statements from the CRNA, we will certainly do what the Court indicates.

I think that what we have learned from the

depositions is what they do is they go back to the records that we're producing, and so you end up in kind of a circle. Now, if it's an affidavit testimony and that gives the Court and the defendant some additional comfort in terms of this is certainly a case where the plaintiff was exposed, we'll certainly comply with the Court's Orders in that regard.

We certainly are interested in avoiding this as well. I mean multiple trips to Idaho and to South Carolina to try and get these things sorted out, you know, is not in our interest or anyone's interest, and we don't want to burden the Court unnecessarily either.

THE COURT: Okay. All right. Well, this is not on the order of a lone pine and that reflects a complete misunderstanding of what we're saying. You now know because of the bellwether process that's gone through so far that there are a number of cases that are being brought by plaintiffs who do not have sufficient reason to know that they actually have a product that was involved in their surgery. That's just a very basic fact.

And we have allowed all of these cases to go forward on the simple check mark, and we now know that's not enough. And to say that 4500 cases should be allowed to proceed now based on a check mark when everybody knows that in reality that doesn't tell you anything is inconsistent with the fundamental requirement that there be some good

faith belief on the part of a plaintiff that they've got a case before they bring it. It has nothing to do with a lone pine order that has all this scientific business. It's not that at all.

And the bellwether process in order to keep identifying issues that are going to be meaningful for generalized use has to overcome that problem at least with respect to the 150. So --

MS. ZIMMERMAN: We agree with that, Your Honor.

THE COURT: Okay. So when you talk amongst yourselves, hopefully, there won't be so many areas of disagreement now. And when you do that, you might be able to talk, I don't know, you can talk today some, I suppose, but the sooner the better.

MS. ZIMMERMAN: Absolutely, Your Honor. With respect to the six bellwethers that have been considered, we know that there's one now, Skaar, where it was not in use. The other ones to our knowledge are all cases that were used. There was one case where it was turned off early. Well, we did certainly learn that from the CRNA.

But I think, respectfully, that the facts at least with these six are not suggestive that there's a lot of cases that have made it this far without any kind of objective proof it's been used in their surgeries.

MR. BLACKWELL: Kamke was another case, Your

Honor.

THE COURT: We're not going to argue about all these cases. Well, you say it.

MAGISTRATE JUDGE NOEL: I was going to say clearly the initial bellwether process when it got down to actually identifying cases was problematic because more than one case it turns out either it wasn't used, it was turned off or whatever the facts are. And I think all we're saying is that in coming up with a process to repopulate the bellwether pool, the parties should focus on that.

And I think what Judge Ericksen is saying is that that burden is more on the plaintiffs than on the defendants, and it's not really about the defendant's sales records or who they sell Bair Huggers to. It's about whether or not this plaintiff was exposed to the device that is alleged to have caused his damages. And I guess maybe I'm not understanding what the burden is or why that's a difficult thing for a plaintiff's lawyer to ascertain at the front end of a lawsuit.

Now, having said that, I'm looking now at defense counsel, and if you've got evidence or you know for sure you never sold Bair Huggers to hospital X where this guy's surgery is, you can't play in the weeds and wait for them to put it on the list and then say, oh, by the way, guess what, yep, not a Bair Hugger, 'cuz we never sold them a Bair

Hugger.

So if you've got evidence like that, that should be part of the give and take in putting together the process for repopulating the Bair Hugger bellwether list would be my thought.

THE COURT: That's exactly right.

MS. ZIMMERMAN: We're in agreement with that. Thank you.

THE COURT: Okay. We've got some plaintiff fact sheet issues to discuss. Mr. Hulse, is this you again?

MR. HULSE: I believe so. Mr. Parekh, do you want to join me?

MAGISTRATE JUDGE NOEL: It occurs to me, I don't know if this is on the record, but we should probably tell everybody Judge Leary is not here. He's under the weather and sent us a note to that effect yesterday, and I just want to make sure the record is clear on that.

THE COURT: Thank you.

MR. HULSE: Yes, thank you, Your Honor.

So the Court has disposed of the pending motion that we had. This was just a small motion with respect to three cases, though Mr. Parekh who represents the plaintiff in one of those cases notes that almost immediately after we filed our motion, he served a PFS for this case. And we don't, you know, while our overall principle is the

deadlines have to be met that, you know, a lot of time passed before the PFS came in. In this case, we don't oppose the setting aside the dismissal.

THE COURT: All right. And that is 17CV2395, docket, right?

MR. PAREKH: Yes, Your Honor. The Hecht case.

THE COURT: All right. Your motion is granted.

MR. PAREKH: Thank you, Your Honor.

MR. HULSE: The related issues, Your Honor, the defendants have proposed a process to deal with the plaintiffs who pass away after the filing of their lawsuits. The plaintiffs, I think their position is they don't think an order like this is necessary. And let me tell you given the background of rules that we have why we have proposed this, and it's something that's been done in other MDLs, if this is an okay time to talk about this issue.

So the issue is that Rule 25A, which provides the process for suggestion of death, it doesn't actually provide a date by which a suggestion of death needs to be filed. So what we've learned over the last several months is that we have dozens and maybe perhaps a hundred plaintiffs who have passed away since filing lawsuits, and they're just lingering out there.

Many already had compliant PFSs, so there is no way we would know through the PFS process that somebody has

passed away. And if we weren't in an MDL, this would have been addressed. But because we are in an MDL without a focus on these cases, these just sort of linger out there. And if the plaintiffs don't tell us or file a suggestion of death, we don't know about it.

So what we've been doing, the defendants, is when we find out about one of these cases, we file a suggestion of death. So what we're proposing here is an Order that is just copied from the *Aredia and Zometa MDL* from a few years back, which would put in a requirement that plaintiffs file a suggestion of death within 30 days of the death of their client. We think that's a reasonable requirement. And after that, we basically follow the process set by the rule.

The other thing that we've incorporated is the Court's prior ruling. This is on July 24th having to do with the *Harkleroad* case. That with the substitution, there has to be a completed, verified PFS served on the defendants too. So we don't -- so the expectations are clear, and that would just be taking that ruling from the *Harkleroad* case and extending it across the MDL.

So I do have, if the Court is interested, copies of the Order from the *Aredia and Zometa MDL* that this is copied from. The plaintiffs have indicated in meet and confer correspondence that they are concerned that this impinges on State Court rules and laws for appointment of

representatives and special administrators. We don't see that at all. That is something that comes up when a motion for substitution has been filed, then we have to be in compliance with whatever the state rule is for being a proper party to be substituted. But there's nothing contrary to state law in requiring plaintiffs to file a suggestion of death within 30 days of their client's death.

MAGISTRATE JUDGE NOEL: And that's the only constraint in your proposal is the 30 days to file the suggestion, then there's no other time limit or requirement that things happen in any given time frame.

MR. HULSE: The only other requirement that really goes beyond the rules is this PFS requirement that we've picked up from the Court's July 24th ruling in Harkel Road case.

THE COURT: Okay. So it's Rule 25 straight up with the insertion of the 30-day.

MR. HULSE: Right.

THE COURT: Okay.

MR. HULSE: Which is a gap that maybe the rules should fill at some point.

THE COURT: I'll get right on it. We meet in -- I guess we don't meet until next year.

MR. HULSE: It's a funny rule.

THE COURT: Have you had this problem in other

case s?

MR. HULSE: There is a bit of an ambiguity in it too in the Court's interpretation of what the word "service" means in this rule too. I know Judge Noel is familiar with this issue. He's confronted it before with some courts taking the viewpoint that filing the suggestion of death and service through ECF meets the service requirement.

Other courts have said you actually need to go and find out anybody, find anybody who is a potential heir or substitute plaintiff and actually serve them according to state law rules, so there's a split of opinion on that.

THE COURT: Okay. Is there any objection to this?

MS. ZIMMERMAN: Your Honor, the plaintiffs' primary objection is with respect to the 30 days. I mean, unfortunately, the reality is a lot of times these people will die and their family members may or may not have any idea that they have a lawsuit pending.

So a lot of times the lawyers aren't going to be advised within 30 days of the actual death. They've got a lot to attend to during that time. So we would suggest that it should be 30 days from the time that the lawyers are provided notice about the death because it's just, it's an onerous burden when lawyers don't necessarily know for many months whether their next of kin are sorting through their effects and trying to figure out what other paperwork needs

to be tended to.

So with that caveat, we recognize there is a duty to provide a notice of suggestion of death upon the record and whether it's service, as Mr. Hulse indicated, I don't think that we're particularly concerned. The concern is more it takes a while sometimes for the next of kin to notify the lawyers. They may not know that they have a case pending. So within 30 days of the lawyers knowing about it, would be our request.

THE COURT: What's the longest State Court time frame that's allowed? Because State Court, there is a requirement that somebody take over the lawsuit in a reasonable period of time. And it sounds like you've had occasion to become familiar with the various state laws so what's the --

MS. ZIMMERMAN: I wish I could tell you what the longest is across the country. Usually, what I run into is this reasonable time kind of language so that lawyers can't just sit back and not do anything about it. And the same thing goes for the next of kin, they do need to be diligently working on handling the affairs and the effects afterwards.

THE COURT: There's not even a reasonable time requirement in Rule 25, is there?

MS. ZIMMERMAN: Not that I'm aware of.

MAGISTRATE JUDGE NOEL: I think where Judge Ericksen is going -- maybe I'm wrong.

THE COURT: No, you're right.

MAGISTRATE JUDGE NOEL: Instead of 30 days from when the lawyer learns, what if we just extended the 30 days to some longer period of time? Would that be another way to fix your concern?

MS. ZIMMERMAN: That's a good question, Your Honor. I'd have to check and see if there was some kind of outside back stop. If there is some state that says you get a year or something like that. I'm not aware of that. As I stand here, I think a year seems like a long time. I would hope that people would be able to get lawyers notice within a couple of months. Perhaps we can research to see if there's some sort of state statute we would be running afoul of and otherwise propose something to Your Honors.

THE COURT: Couldn't we do the 30 days, and then if it turns -- so that triggers something, so then the family gets notice. And if it turns out that they want to take action, then you can come back and try to get it re-upped, just like we did with this --

(Court conferring off the record.)

MR. HULSE: I think I could add something to this sort of. All, of course, a suggestion of death is just the statement on the record that the plaintiff has died. It

triggers the 90 day period for substitution. The advisory committee notes make clear that the Court can grant for good cause an extension of that 90-day period. So if basically things are dragging out in State Court with the appointment of the personal representative, counsel can come in and ask for an extension.

MAGISTRATE JUDGE NOEL: That's not the concern. And I understand the concern that Ms. Zimmerman raises is that the lawyer who represents the plaintiff who is now dead may not know that guy is dead for many more than 30 days after he or she has died, and that that's the piece of your proposal that's being attacked is that if I were to die and I have a lawsuit pending, my wife may not even know I have a lawsuit pending. And --

THE COURT: She wouldn't even know you're dead. Get a different example.

MAGISTRATE JUDGE NOEL: I'm just going to let that one go. The point is that the 30 days is too short a window, 30 days from the date of death is too short of a window for a lawyer to get that suggestion of death on the record.

MR. HULSE: Here's a thought about that, and I'm sympathetic to that. My suggestion would be to make it 60 days instead of 30. And here's the reason why I still think it should be based on the death and not the notice.

If we weren't in an MDL, then the plaintiffs' counsel would be in more regular contact with their clients. Here, because we're in an MDL, if we don't require plaintiffs' counsel to be checking in from time to time, we're just going to end up in the same situation where they're not in contact for a year with their clients, and we really haven't fixed the problem. So we'd be fine with 60 days instead of 30. That gives a window for plaintiffs' counsel to check in bimonthly with their clients, which seems like a reasonable expectation to us.

THE COURT: There are ways to monitor.

MS. ZIMMERMAN: Yes, I mean there are a number of those --

THE COURT: We can put a mirror over there or you can take their blood pressure.

MR. HULSE: We'll check 80 percent of the cases.

MS. ZIMMERMAN: Mr. Assaad offers a good point, who do we call because we don't, if the plaintiff is dead, but.

MR. HULSE: In the PFS, of course, if you can't reach your plaintiff for a period of time, then it probably is time to call any of those other people who are listed in the PFS, the family, or spouses. Many of these spouses, of course, have a loss of consortium claim. So it doesn't seem, again, it doesn't seem like anything other than the

regular expectation of diligent representation of your clients.

MS. ZIMMERMAN: Well, I think the plaintiffs respect that, and I think that we should afford these families the opportunity to get with their lawyers and make sure that we can go through the procedural requirements. But I don't think that there's any prejudice to the defendants, particularly if it's not a case that's presently being worked up for trial, if they get a little bit of extra time to gather paperwork.

THE COURT: Hold on, let's just think.

(Court conferring.)

THE COURT: All right. It will be 90 days from the date of death. Plaintiffs' counsel files a suggestion of death following which the Rule 25 procedures kick in.

MS. ZIMMERMAN: Thank you, Your Honor.

MR. HULSE: And, Your Honor, as far as our Proposed Order?

THE COURT: It will be just like that only it will be 90 days.

MR. HULSE: And should we submit one that makes that revision?

THE COURT: No, we can do it.

MR. HULSE: Okay, we can do it.

MAGISTRATE JUDGE NOEL: Sorry for the next mixed

signal. I was saying yes.

THE COURT: I misspoke. I misspoke.

MAGISTRATE JUDGE NOEL: No, no, no, you spoke and your word is the Order. So we can substitute 30 for 90 or 90 for 30.

THE COURT: I was just showing off that we were able to do that.

MR. HULSE: The language is we'd like the PTO that goes up on the website and everything, so everybody could see it and so --

THE COURT: Could you just hold on for a second?

MR. HULSE: Of course.

(Court conferring.)

THE COURT: If you're willing to do it, would you do it?

MR. HULSE: Of course.

THE COURT: Thank you. Okay. Done. All right. What about these other ones?

MR. HULSE: I assume you're referring to PFSs, Your Honor.

THE COURT: Yes.

MR. HULSE: There's nothing else to be decided today. We'll have a motion for the next status conference as the procedure goes that probably involves quite a few more cases, but no other items for decision today, at least

not from our perspective.

THE COURT: Okay. And Ms. Zimmerman, I don't know who the people are behind you but they seem very unhappy about something, so maybe you want to consult with them.

MS. ZIMMERMAN: The folks at the counsel table?

THE COURT: No, the people behind you. Did they want to be heard or something?

MS. ZIMMERMAN: Does anybody have any PFS issues that they need to have addressed? No.

MR. HULSE: Your Honor, my apologies, it slipped my mind. We do have the Houseman case motion to dismiss. We'd be willing to just have that taken on the papers. I have nothing to add beyond what's in our brief.

THE COURT: Okay. Dead person.

MS. ZIMMERMAN: I don't know if Mr. Webb is on the phone and wants to be heard. I have not been told that.

THE COURT: Mr. Webb, are you on the phone? Mr. Web?

MS. CORDRAY: This is Abby Cordray. I'm his paralegal. Seth is not on the phone, but I am representing for him.

THE COURT: Could we have your name and spelling, please?

MS. CORDRAY: It's A-B-B-Y. And the last name is C-O-R-D-R-A-Y.

THE COURT: And you're an attorney representing?

MS. CORDRAY: No, I'm actually his paralegal.

THE COURT: Okay.

MAGISTRATE JUDGE NOEL: But you work with the lawyer that represents Ms. Houseman and/or her estate?

MS. CORDRAY: Correct, yes.

MAGISTRATE JUDGE NOEL: Okay. And Mr. Hulse for the defendant has suggested that we can just decide the motion to dismiss that case on the papers without any further oral argument. Do you think the lawyer you work with would be agreeable to that?

MS. CORDRAY: Yes, I believe so.

THE COURT: All right. Thank you very much. We'll do that.

MS. CORDRAY: You're welcome.

THE COURT: So the update on the number, nothing to be added there, I don't believe.

MS. ZIMMERMAN: Nothing to add, Your Honor. We did have Dave Szerlag's office did a census, and it does include not just 4,116 plaintiffs but also represented by 134 law firms, and I thought the Court might be interested to know that.

THE COURT: Thank you.

Okay. There's the Ramsey County cases. Somewhere there's an -- let me just go through these in order. The

Rodriguez in Illinois. The trial is set for next summer.

MS. LEWIS: Yes, Your Honor. Deborah Lewis for 3M.

THE COURT: And you've got a trial on the Rodriguez matter scheduled for July 30th?

MS. LEWIS: Yes.

MAGISTRATE JUDGE NOEL: You need a microphone.

MS. LEWIS: Good morning, Your Honors. Deborah Lewis for 3M. Yes, the Rodriguez matter is set in Lake County, Illinois, this summer. There is no other scheduled dates beyond the trial setting at this point.

THE COURT: Well, you've got a status conference for January, right? It says, "next status conference scheduled for January 23rd."

MS. LEWIS: I, unfortunately, don't have those full dates in front of me but --

MR. HULSE: That's correct.

MS. LEWIS: -- yes.

THE COURT: All right. Interesting. Do you think that's a date certain for trial?

MS. LEWIS: I don't know that it's not. We've not had a court hearing beyond the motion to dismiss.

THE COURT: Okay. Thank you, Ms. Lewis.

MS. LEWIS: Thank you.

MR. HULSE: I can add one maybe more thing on

Rodriguez. So Your Honors, while that is a date certain right now on the Court's calendar, based on my discussion with plaintiff's counsel, it's not his desire to be out in front of the MDL. So nothing binding, no agreement, but I think there is a good probability that the case will ultimately, the trial date will fall farther back.

THE COURT: Okay. All right. Canada, no additional activity since we last spoke.

Discovery, nothing to do about that right now I don't believe.

Is there anything else to discuss before we go back and talk about the Gareis fact specific dates?

MR. BLACKWELL: Only, Your Honors, if I might be excused from the informal discussion. Mr. Hulse and Ms. Ahmann will go. I've been parachuted in to try a case in LA the first week in January, and I've got a lot to learn, and so I'm anxious.

THE COURT: Well.

MAGISTRATE JUDGE NOEL: How did you arrange that LA thing in January?

MR. BLACKWELL: The Honolulu thing in November was even better.

THE COURT: Maybe you just want to come back for a moment.

MR. BLACKWELL: All right, I will, Your Honor.

THE COURT: Anybody on the phone have anything that they want to be heard on at this point?

MR. BURKE: Your Honor, this is Daniel Burke from Bernstein Liebhard. May I be heard?

THE COURT: Yes.

MR. BURKE: Hi. So your Order, the Court's Order dated December 18th concerning fact sheets with respect to my client Rhonda Morgan notes that there was no opposition filed to that motion. And I think what happened was the Court confused or mistakenly substituted our opposition for Morgan with the Order with respect to Kimberly Charles. And I just wanted to clarify the record that we did in fact serve and file an opposition to the motion.

And I understand that the Court is going to dismiss it with prejudice, but I just wanted for purposes of my client to note on the record that we did in fact oppose the motion.

THE COURT: I apologize for that. We'll get that fixed.

MR. BURKE: Thank you, Your Honor.

THE COURT: Anybody else? All right. Thank you. We're in recess.

(Court adjourned at 10:45 a.m.)

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REPORTER'S CERTIFICATE

I, Maria V. Weinbeck, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Maria V. Weinbeck*

Maria V. Weinbeck, RMR-FCRR